

of the NPPA Journal presents no novel insights, it furnishes a good coverage of the problem.

Under the present state of affairs, prisons are by and large "revolving door" systems under which many offenders serve what is virtually a life sentence on the installment plan, largely because of the obstacles in the way of stable, worthwhile employment (p. 135). Private business and industry, fearful of the risk, are reluctant to hire persons with a criminal record. The State, while it urges private employers to hire ex-convicts, restricts the job opportunities of offenders in private employment by refusing them licenses (in an age of licensing) and barring them from public employment.¹ The attitude of bonding companies towards offenders is also a major problem encountered in their job-placement. Judging from opinions expressed in prison newspapers, it appears that prisoners generally consider the opening up of state employment as the only solution to the employment-of-offenders problem.

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JUDICIAL REVIEW OF ADMINISTRATIVE ACTION. By S. A. de Smith. London: Stevens & Sons Limited. New York: Oceana Publications. Pp. xlvii, 486. £3 10s. \$11.00.

There can be little doubt that Stanley de Smith's study of judicial review of administrative action in the English courts will prove of immense value to English lawyers and students of the governmental process. It is a careful and critical work of scholarship. It is comprehensive in its treatment of English doctrines of judicial review and as exhaustive as the limits of one volume permit. The style is polished and precise. Although this reviewer is not qualified to judge the details, the book is obviously an impressive performance.

For the American lawyer, however, the book is hard going and not very rewarding. The main reason for this is that the study is organized and developed on a purely doctrinal level. Part One consists of an introductory chapter and an analysis of the "classification of functions" performed by administrative (or executive) institutions: "ministerial," "administrative," "legislative" and "judicial." Part Two deals with the main doctrines determining the right to judicial review and the scope of review. These include the

¹Civil Service Commissions are a notable barrier to offender employment (p. 143). See generally Slovenko, *The Treatment of the Criminal in Louisiana and Elsewhere*, 34 Tul. L. Rev. 523 (1960).

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doctrines of "ultra vires," "jurisdiction," "natural justice" and control over "discretionary powers." A final chapter in Part Two discusses various statutory efforts to afford or restrict judicial review. Part Three, nearly half the book, approaches the problem from the standpoint of the various judicial remedies through which review is obtained. This deals with the history of the prerogative writs and then takes up certiorari and prohibition, injunction, action for a declaration, and remedies for failure to perform public duties. "The pursuit of brevity," Dr. de Smith states in his Preface, "led me to take the difficult decision not to include a chapter on the modern law relating to the writ of habeas corpus."

Dr. de Smith is by no means a slave of the doctrines which he expounds so well. His attitude is well revealed in a passage where, after discussing the "classification of functions," he concludes:

"In this 'highly acrobatic part of the law' an aptitude for verbal gymnastics is obviously of advantage. The usual meanings of words can be stretched, contorted and stood upside down to suit the purposes of the user. The courts have, indeed, shown a remarkable dexterity in adapting their vocabulary to the requirements of particular situations. To say that the scope of judicial review may be determined by the manner in which the courts classify statutory functions is, no doubt, formally correct; but in many cases the truth of the matter is that the mode of classifying statutory functions is determined by the scope of review that the courts deem to be desirable and practicable. Yet although the classification of a function as 'judicial' or 'administrative' is often nothing more than a rationalisation of a decision prompted by considerations of public policy, there are also cases in which courts will feel bound by precedent to adopt a particular mode of classification against their own inclinations. If it were otherwise, much of the preceding analysis of definitions and their application in individual contexts would be superfluous." (pp. 50-51)

And in summarizing the use by the courts of the doctrine of "jurisdiction" in judicial review, he states:

"There is no want of modern authority to draw upon when a court is inclined to hold that an erroneous finding by a statutory tribunal goes to jurisdiction. But although the courts are usually prepared to set aside decisions which in their opinion are wrong, and to justify their intervention on jurisdictional grounds, it would be incorrect to say that the scope of jurisdictional control is exactly co-extensive with the powers of review that a court thinks it desirable

to exercise in any particular case. It has not been unknown for a court to express its regret that it is unable to set aside an erroneous determination by an inferior tribunal because the tribunal's error did not go to its jurisdiction." (pp. 75-76)

But Dr. de Smith does deal with the issues almost exclusively in terms of doctrine. Very likely, at the present stage of English administrative law and of English scholarship in the field, such a treatment is necessary and useful. Yet for those not familiar with English procedure, practice and problems, the account is often difficult to follow and the total effect obscure. There is virtually no discussion of the facts of the cases in which the courts invoke the various doctrines, and no appraisal of the impact of court action upon the operation of the administrative agencies or upon the actual problems with which the agencies undertake to deal.

For the American lawyer most of the doctrinal development with which the English courts appear to be engrossed seems to have little relevance to current issues with which he is concerned. The "classification of functions" plays some role in the distinction enshrined in the Administrative Procedure Act between rule making and adjudication, but the need to make such a distinction arises only occasionally and when it does the courts are more likely to reason from result to doctrine than from doctrine to result. The concept of "ultra vires" is in American law the whole sprawling problem of statutory interpretation. "Jurisdiction" as a controlling factor in judicial review has been invoked only sporadically and usually with such unhappy results that it has been quickly abandoned or quietly forgotten. The notion of "natural justice" is akin to due process, but is of course far more limited in scope. The term "discretion" has no precise meaning or use in American administrative law, except as employed in a very narrow sense in Section 10 of the Administrative Procedure Act. And the common law forms of action play very little part in determining the right to judicial review, the method of obtaining it, or the scope of the court's power to scrutinize the action of the administrative agency.

In short one gains the distinct impression that American law on judicial review of administrative action is in a far more advanced stage than English law. One can hazard a guess that this is due to at least two factors. One is that the constitutional requirement of due process has furnished the American courts with a far broader and more pervasive doctrine on which to base judicial control over administrative action, thus permitting a freer and more rational molding of the relations between the courts and the administrative agencies. The other is that American legislatures,

both federal and state, seem to have undertaken a much more conscious effort to delineate the role of the judiciary in the administrative process. This has resulted in statutory provisions which control, in general terms at least, most issues of the right, methods and scope of judicial intervention. The English courts, on the other hand, seem to have muddled along, bending ancient doctrine to meet the new problems posed by the growth of administrative action. Even the Tribunals and Inquiries Act of 1958, following the Franks inquiry, appears to have made only a small beginning in rationalizing English administrative procedure.

Another reason why Dr. de Smith's book is of limited assistance to the American lawyer is that, so far as one can tell from the brief factual references and the names of the cases cited, the substantive problems which the doctrines and procedures are designed to solve differ considerably in the two countries. The raging controversies which have marked the progress of American administrative law over the functions entrusted to the ICC, FTC, NLRB, SEC, FCC, CAB, state public utilities commissions, and similar agencies seem to have very little counterpart in the English system. American problems involving the application of the administrative process in personal liberty cases — such as the loyalty programs, the issuance of passports, and the registration provisions of the Internal Security Act — are also not reflected, for differing reasons, in English administrative law. On the other hand, there is some overlapping in such areas as the licensing of trades and professions, health laws and social welfare legislation. And one of the major sources of the development of administrative law in England — housing and town planning legislation — is just beginning to become an important issue here.

Similarly, it is hard for American lawyers to appraise the English law without knowing more about the institutional context, which is obviously quite different in the two countries. Plainly the English system of parliamentary government, with direct control of the executive by the legislature, raises quite different questions in regard to delegated legislation and control over rule making than does our system based upon a separation of legislative and executive powers.

The underlying problem of judicial review, both in England and in America, is what part the courts can, should, and do play in supervising administrative agencies and in the functioning of the administrative process generally. The answer to these questions involves a study not only of the doctrinal basis for judicial review but of the actual impact of judicial review in the various areas of government. Has judicial review afforded significant pro-

tection to parties before various administrative agencies without unduly obstructing the operation of those agencies? Is it more than a last desperate effort available only to well-heeled parties seeking to gain the advantages and pressures of delay? Has its impact been largely in terms of assuring the forms of proper procedure rather than the substance of justice? Has it tended toward a judicialization of the administrative process? Is there any way to employ judicial supervision as an affirmative as well as a negative control? Does it interfere with the coordination of over-all policy necessary in a modern government?

What the effect of judicial review has been on the English administrative process is not answered by this book. But comparable questions are not answered in American writing on judicial review either.

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Law in Eastern Europe. Volume 4. The Merchant Shipping Code of the Soviet Union. Edited by Z. Szirmai. Leyden: A. W. Sythoff. 1960. Pp. 151.

The maritime law traversed the French Revolution of 1789 without being overthrown. Article 2120 of the French Civil Code states: "The present code makes no alteration in the maritime laws as to ships and seagoing vessels." The French Code of Commerce reproduces almost textually Louis XIV's *Ordonnance de la Marine* of 1681. In 1807, the time of the Code, the status of the marine industry did not differ very much from the situation in 1681, and there was thus no need for change. It was not until the middle of the nineteenth century that there were new methods in navigation.

The maritime law likewise traversed the Bolshevik Revolution of 1917 without being overthrown. Prior to the Revolution, Russia's maritime trade was generally carried out in foreign vessels, and disputes were usually settled in England rather than in Russia. In short, Tsarist Russia had no maritime law of her own. In 1929, towards the end of the NEP-period, the Soviet Union adopted a Merchant Shipping Code, the bulk of whose provisions has survived through the years and is now being applied. The Soviet Merchant Shipping Code, strange as it may seem, is not unique. The majority of its provisions are taken from the general maritime law. The Soviet rules on contracts of carriage of goods by sea draw from the Hague Rules of 1924; the rules as to collisions, salvage, limitation of shipowners' liability, and privileged claims largely repro-

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